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August 31, 2007

FILED/ACCEPTED
AUG 31 2007
Federal Communications Commission
Office of the Secretary

EX PARTE

ORIGINAL

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: **Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Dkt No. 05-311;**

Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act Licensees and their Affiliates; and Sunset of Exclusive Contract Prohibition, MB Dkt No. 07-29;

Carriage of Digital Television Broadcast Signals: Amendment of Part 76 of the Commission's Rules, CS Dkt. No. 98-120

Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Dkt No. 07-51

Dear Ms. Dortch:

On August 30, 2007, Will Johnson and I met with Cristina Chou Pauze, legal advisor to Commissioner McDowell to discuss our positions in the above-referenced proceedings.

Regarding program access, we argued that, given the current critical time in the development of video competition, the Commission should extend its existing ban on exclusive contracts between cable operators and their affiliated programmers, although this restriction should sunset after competition firmly takes hold. We also asked the Commission to ensure that vertically integrated programmers not be permitted to artificially carve up programming that is subject to the program access rules into different "feeds," in an effort to deny competitors with access increasingly essential HD programming. In addition, we suggested that the Commission adopt a firm deadline of five months for resolving all program access disputes and a standstill requirement for disputes over the renewal of programming contracts.

On cable customer service regulations, we stated that while local franchising authorities (LFAs) have flexibility under the Cable Act to adopt reasonable cable customer service requirements, they do not have unfettered discretion to adopt any regulation over video and broadband providers just by characterizing it as a "customer service" regulation. We asked the

Commission to make explicit that any state or local customer service regulations, to avoid federal preemption, must be true "customer service" regulations, and not other regulations in disguise. Moreover, such regulations must be limited to cable services, and may not unreasonably burden competitive video entry. Finally, we urged the Commission to reiterate that any local cable customer service regulations that undermine federal policies encouraging broadband deployment and video competition are preempted.

On the issue of carrying must-carry stations after the transition to DTV, we asked the Commission to retain its current degradation standards that ensure picture quality, without inhibiting innovation or preventing compression techniques that allow providers to carry additional programming without degrading picture quality. We also reiterated that providers transitioning to all-digital systems and services need flexibility to address issues concerning their customers' ability to view digital programming on analog television sets. In particular, we emphasized that the suggestions of commenters that all-digital providers should be required to give away converter equipment would be unlawful. Any such requirement would violate Section 614(b)(7), which recognizes that "viewability" obligations may be satisfied when a provider offers to "sell or lease" equipment necessary to view a signal. 47 U.S.C. § 534(b)(7). In the case of a competitive provider, such a requirement would also violate the Cable Act's rate regulation provision, by regulating the rates at which a provider subject to "effective competition" may offer converter equipment to its subscribers. *See* 47 U.S.C. § 543(a)(2), (b)(3). In addition, Section 629, which seeks to encourage the competitive availability of navigation devices while also recognizing the right of video providers to sell or rent their own devices, would preclude any such giveaway rule that would effectively preempt the creation of a competitive market for digital converter equipment. *See* 47 U.S.C. § 549(a). Finally, attaching such a price to a provider's decision to go all-digital would raise significant constitutional concerns, both under the First Amendment and the Fifth Amendment.

With respect to exclusive access agreements between video providers and multiple dwelling unit (MDU) owners for the provision of video services, we stressed the importance of prohibiting video providers from enforcing existing exclusive access contracts for a limited period of time so that wireline video competition is given a chance to take hold. Exclusive access agreements are analogous to exclusive franchises that have long been barred, as they completely deny new entrants the ability to offer service to the residents of MDUs or other properties that are subject to such agreements. Similarly, we explained that existing exclusive access contracts may deny consumers living in MDUs the benefits of new competitive entry now emerging in the video marketplace. The record in this proceeding reveals that cable incumbents have used exclusive access agreements – many of which are long term and were entered at a time when no competitive, wireline providers were available – as a tool to "lock up" properties and frustrate competitive entry.

Sincerely,